Petition

81-1624

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

D. E. BAKER, CLIFF TAYLOR, CARNEY LONG, AND TED JAMES, INDIVIDUALLY, AND ON BEHALF OF OTHER EMPLOYEES OF SOUTH BEND LATHE,

PETITIONERS,

VS.

AMSTED INDUSTRIES, INCORPORATED, A CORPORATION, AND UNITED STEELWORKERS OF AMERICA,

RESPONDENTS.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Can a group of employees bring an action in Federal District Court, alleging a violation of the minimum vesting provisions of the Employee Retirement Income Security Act of 1974 (hereinafter ERISA) and seeking a declaratory judgment, without first exhausting the grievance procedures contained in their collective bargaining agreement?

2. Was it proper to determine by means of summary judgment that a union had not breached its duty of fair representation where the union had failed, without explanation, to arbitrate an acknowledged meritorious pension dispute for over five (5) years after being ordered to do so by a Federal District Court.

TABLE OF CONTENTS

		Page
Questions Presented for Review		i
Table of Authorities		iv
	Cases	iv, v
	Other Legal Authorities	vi
I	The Official and Unofficial Reports of Opinions Delivered in the Courts Below	1
II	Statement of Grounds Supporting Jurisdiction	3
III	Statement of the Case	4
	A. The basis for Federal jurisdiction in the Court of first instance	4
	B. The material facts	4
IV	Argument	10
	A. A group of employees can bring an action in Federal District Court alleging a violation of ERISA's minimum vesting standards and seeking a declaratory judgment without first exhausting the grievance procedure contained in their collective bargaining agreement	10

Page

1. The Seventh Circuit Court of Appeals' decision in this case conflicts with applicable decisions of this Court..... 10

B. It was improper to determine by means of summary judgment that the Union had not breached its duty of fair representation where the Union had failed, without explanation, to arbitrate an acknowledged meritorious pension dispute for over five (5) years after being ordered to do so by a Federal District Court..... 14

1. The Seventh Circuit Court of Appeals' decision in this case conflicts with applicable decisions of this Court and is in conflict with decisions of other Federal Courts of Appeal on the same matter..... 14

V Conclusion..... 23

Appendix

TABLE OF AUTHORITIES

Cases

	Page
Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S.Ct. 1011.....	11
Baldini v. Local Union No. 1095, UAW, 581 F.2d 145, (7th Cir. 1978).....	20
Barrentine v. Arkansas-Best Freight System, _____ U.S. _____, 101 S.Ct. 1437 (1981).....10, 11, 12, 13	
Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351, 91 S.Ct. 409, (1971).....	12
Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 96 S.Ct. 1048 (1976).....	19
McKinney v. Missouri-Kansas-Texas R. Co., 357 U.S. 265, 78 S.Ct. 1222 (1958).....	11
Melendy v. United States Postal Service, 589 F.2d 256, (7th Cir. 1978).....	20
Nedrow v. MacFarlane & Hays Co. Employees Profit Sharing Plan and Trust, 476 F.Supp. 934 (E.D. Mich. 1979).....	13

Page

Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1082 (9th Cir. 1978)..... 19

Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975)..... 20

Thomas v. Marshall, 482 F.Supp. 160 (S.D.Ala. 1979)..... 13

Tucci v. Edgewood Country Club, 459 F.Supp. 940 (W.D.Pa. 1978)..... 13

United States v. Diebold, Inc., 369 U.S. 654, 82 S.Ct. 993 (1962)..... 20

Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903 (1967).... 19

Winer v. Edison Bros. Stores Pension Plan, 593 F.2d 307 (8th Cir. 1979)..... 13

Other Legal Authorities

	Page
29 U.S.C. §185	4
29 U.S.C. §202	12
29 U.S.C. §216(b)	13
29 U.S.C. §1001	12
29 U.S.C. §1132(a)(1)(B)	4, 13
29 U.S.C. §2201	4

I

THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

D. E. Baker, et al., Plaintiffs-Appellants, v. Amsted Industries, Incorporated, a corporation, and United Steelworkers of America (hereinafter the Union), Defendants-Appellees.

D. E. Baker, et al., Plaintiffs-Appellees, v. Amsted Industries, Incorporated, a corporation, Defendant-Appellant, 656 F.2d 1245 (7th Cir. 1981).[1]

D. E. Baker, et al., Plaintiffs-Appellants, v. Amsted Industries, Incorporated, a corporation, and United Steelworkers of America, Defendants-Appellees.

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1 The names of all the parties are D. E. Baker, Cliff Taylor, Carney Long, and Ted James, individually, and on behalf of other employees of South Bend Lathe, as plaintiffs; Amsted Industries, Incorporated, a corporation, and United Steelworkers of America, as defendants.

D. E. Baker, et al., Plaintiffs-Appellees, v. Amsted Industries, Incorporated, a corporation, Defendant-Appellant, Nos. 80-2654 and 80-2760 (7th Cir. Aug. 21, 1981), modified (filed Dec. 2, 1981).

D. E. Baker, et al., Plaintiffs, v. Amsted Industries Incorporated, a corporation, and United Steelworkers of America, Defendants, No. S 80-79 (N.D.Ind., filed Oct. 22, 1980).

II

STATEMENT OF GROUNDS SUPPORTING JURISDICTION

A. The original judgment in this case was entered on August 21, 1981.

B. The order denying rehearing was entered December 2, 1981.

C. It is believed that 28 U.S.C. §1254(1) confers on this Court jurisdiction to review the judgment in question by writ of certiorari.

D. The Federal statutes which this case involves are: 28 U.S.C. §1254(1); 28 U.S.C. §2201; 29 U.S.C. §185(a),(c); 29 U.S.C. §202; 29 U.S.C. §216(b); 29 U.S.C. §1001; 29 U.S.C. 1002(5),(6),(7); 29 U.S.C. §1003(a)(1); 29 U.S.C. §1132 (a)(1)(B); 29 U.S.C. §1132(a)(3); 29 U.S.C. §1132(e)(1),(2); 29 U.S.C. §1132 (f); 29 U.S.C. §1132(g)(1).

The foregoing statutes are set out verbatim in the Appendix.

III

STATEMENT OF THE CASE

A. The basis for Federal jurisdiction in the Court of first instance.

In their complaint, Petitioners alleged as a jurisdictional basis both ERISA's declaratory judgment section (29 U.S.C. §1132(a)(1)(B)), §301 of the Labor Management Relation Act of 1947 (29 U.S.C. §185) and the Federal Declaratory Judgment Act (29 U.S.C. §2201).

B. The material facts.

The Petitioners are ex-employees of Amsted's South Bend Lathe Division.

While employed by Amsted, the Petitioners were represented for collective bargaining purposes by the Union.

Since October 7, 1968, there has been an amended retirement plan and pension agreement in effect between Amsted and the Union.

A labor agreement was in full force and effect between Amsted or its successor and the Union from October 7, 1974, through October 6, 1977. Article XIV of the labor agreement provided for pension and insurance benefits and incorporated by reference the retirement plan and pension agreement.

Amsted sold its South Bend Lathe Division as of July 3, 1975. Negotiations between Amsted and the Union regarding the employees' pension and insurance rights as they might be affected by the pending sale were held from April 7, 1975, through November 7, 1975.

Negotiations terminated without an agreement being reached. During a meeting held in December, 1975, Amsted expressed its willingness to bilaterally arbitrate the pension and insurance dispute. The Union proposed the name of an arbitrator, but an agreement as to the arbitrator was

not reached.

ERISA became effective and the Union thought that the subject pension plan might be affected by it. Amsted acknowledged that the pension plan did not meet ERISA's requirements.

Then, on April 23, 1976, the Union expressed its "great concern" over the substantial and unresolved pension and insurance dispute. It demanded that Amsted arbitrate the dispute.

Amsted refused the Union's demand of tripartite arbitration.

The Union filed suit to compel arbitration of the pension and insurance dispute in the United States District Court for the Northern District of Indiana, Hammond Division (hereinafter Hammond litigation).

Amsted filed a motion to dismiss that action and filed the affidavit of Lester T. Moate in support of the motion wherein

Amsted agreed to bilaterally arbitrate the dispute with the Union.

Based on the Moate affidavit, Judge McNagny ordered Amsted dismissed from the Hammond litigation, but granted the Union leave to reinstitute proceedings against Amsted in the event it failed to bilaterally arbitrate the pension and insurance dispute.

Subsequent to Judge McNagny's order of October 1, 1976, the Petitioners made numerous oral requests for information concerning the progress of the arbitration between Amsted and the Union. The inquiries were directed to both the Union's International Representative and its Assistant General Counsel. No answers were provided. A meeting was held in January, 1979, between the Petitioners and the Union's General Counsel for the purpose of discussing why nothing was being done to arbitrate the pension and

insurance dispute. The Union's General Counsel was given a petition signed by the ex-employees of Amsted wherein they demanded that the Union immediately institute arbitration as ordered by Judge McNagny.

In December, 1979, some of the Petitioners met in Chicago with the Union's Assistant General Counsel to inquire as to what, if anything, was being done to arbitrate the pension and insurance dispute. No specific reason for the long delay was given. The question has never been answered.

After this suit was threatened, the Union demanded that Amsted bilaterally arbitrate the pension and insurance dispute. On April 2, 1980, Amsted refused to arbitrate.

On March 27, 1980, Petitioners filed the instant complaint seeking to have their rights declared as to future

benefits under the retirement plan and pension agreement and labor agreement as those rights were affected by the passage of ERISA.

In response to Amsted's motion to dismiss or for summary judgment, the District Court ruled that, under the foregoing undisputed facts, the Union had not, as a matter of law, breached its duty of fair representation. Both Amsted and the Union were granted summary judgment. Petitioners complaint was dismissed without prejudice to the extent that Petitioners could refile the suit after the Hammond litigation was terminated.

The Seventh Circuit Court of Appeals affirmed the District Court's opinion as to Petitioners' ERISA claims but held that Petitioners' §301 claim should have been dismissed with prejudice.

IV

ARGUMENT

A. A group of employees can bring an action in Federal District Court alleging a violation of ERISA's minimum vesting standards and seeking a declaratory judgment without first exhausting the grievance procedure contained in their collective bargaining agreement.

1. The Seventh Circuit Court of Appeals' decision in this case conflicts with applicable decisions of this Court.

In Barrentine v. Arkansas-Best Freight System, _____ U.S. _____, 101 S.Ct. 1437 (1981), this Court held that deferral to

arbitration pursuant to a grievance procedure contained in a collective bargaining agrement was not necessary " . . . where an employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers."

> Barrentine v. Arkansas-Best Freight System, id., at 1443.

This rule has been applied in a number of situations similar to the instant case.

> BARRENTINE V. ARKANSAS-BEST FREIGHT SYSTEM, id. (alleged violation of minimum wage provisions of Fair Labor Standards Act (hereinafter FLSA));
> ALEXANDER V. GARDNER-DENVER CO., 415 U.S. 36, 94 S.Ct. 1011 (1974) (alleged violation of Title VII of the Civil Rights Act of 1964);
> MCKINNEY V. MISSOURI-KANSAS-TEXAS R. CO., 357 U.S. 265, 268-270, 78 S.Ct. 1222, 1224, 1225 (1958) (employee returning

from military duty need not pursue grievance and arbitration procedures prior to asserting seniority rights in Federal Court under Universal Military Training and Service Act);

Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351, 357, 91 S.Ct. 409, 412 (1971)(seaman may assert wage claim in Federal Court under Seaman's Wage Act without first resorting to contractually established arbitral remedies).

All of the reasons enunciated by this Court in Barrentine v. Arkansas-Best Freight System, supra, in support of its conclusion that FLSA cases may be tried de novo in Federal District Courts are equally applicable to this case: the Congressional purposes in enacting the FLSA and ERISA are almost identical, compare 29 U.S.C. §202 (FLSA declaration of Congressional policy) with 29 U.S.C. §1001 (ERISA declaration of Congressional policy); the statutory en-

forcement scheme under the FLSA and ERISA are identical in all material respects, compare 29 U.S.C. §216(b) with 29 U.S.C. §1132(a); the substantive provisions of the FLSA and ERISA are not waivable.

BARRENTINE V. ARKANSAS-
BEST FREIGHT SYSTEM,
supra, at 1445;
NEDROW V. MACFARLANE &
HAYS CO. EMPLOYEES
PROFIT SHARING PLAN
AND TRUST, 476 F.Supp.
934 (E.D.Mich. 1979);
THOMAS V. MARSHALL, 482
F.Supp. 160 (S.D.Ala.
1979);
Tucci v. Edgewood Country
Club, 459 F.Supp. 940
(W.D.Pa. 1978);
Winer v. Edison Bros.
Stores Pension Plan,
593 F.2d 307 (8th Cir.
1979).

Further, as in FLSA cases, an arbitrator may not be competent to interpret ERISA or, in the arbitration process, the union might sacrifice an individual employee's pension rights so as to maximize pension benefits to its other members.

Barrentine v. Arkansas-
Best Freight System,

supra, at 1445, 1446.

The Seventh Circuit Court of Appeals was wrong when it said Petitioners were required to exhaust their administrative remedies before resorting to the Federal Court to have their rights to future pension benefits declared pursuant to ERISA's Declaratory Judgment Act.

B. It was improper to determine by means of summary judgment that the Union had not breached its duty of fair representation where the Union had failed, without explanation, to arbitrate an acknowledged meritorious pension dispute for over five (5) years after being ordered to do so by a Federal District Court.

1. The Seventh Circuit Court of Appeals' decision in this case conflicts with applicable decisions of this Court and

is in conflict with decisions of other Federal Courts of Appeal on the same matter.

The Union has, without any explanation, refused to arbitrate the pension dispute in this case in spite of the fact that the Union considered the grievance to be meritorious.

In a letter dated March 23, 1976, to Amsted and its South Bend Lathe Division, the Union's Assistant General Counsel stated in pertinent part:

> I have been directed to take every action necessary to resolve a dispute which has existed for some time between your companies and the United Steelworkers of America. That dispute concerns the question of the respective responsibilities of South Bend Lathe and Amsted Industries

under a particular collective bargaining agreement and concerning the pension agreement to which reference is made in that collective bargaining agreement.

* * *

There can be no question that a dispute exists as to the meaning and application of the agreement. Thus, it is apparent that South Bend Lathe's position is that because it no longer is a part of Amsted, South Bend Lathe is not responsible for any pension liabilities which exist because of service by bargaining unit employees prior to July 1, 1975, that it has no obligation of any kind to continue the life and medical insurance coverage for retired employees and that it will not check off and transmit

dues to the Union without additional written authorizations from the bargaining unit employees. On the other hand, Amsted disclaims any responsibility for pension fund contributions based on service of bargaining unit employees through June 30, 1975.

Although you might disagree with some aspects of the foregoing brief summary of your respective positions, I am certain that you can appreciate that the questions of pension fund liability for past service, of the continuation of adequate pension funding and of life and medical insurance coverage for retired bargaining unit employees are of great concern for the Union. I hope that you can appreciate

also that the least costly and most expeditious method to resolve these disputed matters is for all three parties -- South Bend Lathe, Amsted Industries and the Union -- to submit these disputes to final and binding arbitration. . . .

The Union filed suit to compel arbitration of this meritorious grievance and, on October 1, 1976, Judge McNagny of the United States District Court, Northern District of Indiana, Hammond Division, ordered the Union and Amsted to arbitrate the dispute.

In spite of numerous pleas by Petitioners and others for the Union to arbitrate the pension dispute with Amsted, the Union, without offering any justification or excuse for its dilatory tactics, has arbitrarily refused to proceed with arbitration. Over five (5) years have gone by since the Union won the right to

arbitrate the pension dispute with Amsted, and it has not done so.

This Court has said that a Union, " . . . may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion . . . "

> Vaca v. Sipes, 386 U.S. 171, 191, 87 S.Ct. 903, 917 (1967).

The Union has never said that arbitration of this dispute would be fruitless.

> Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 96 S.Ct. 1048 (1976).

A Union can breach its duty of fair representation by failing to inform an employee that a grievance will not be taken to arbitration and thereby jeopardize the employee's rights.

> Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1082 (9th Cir. 1978).

Contrary to the Seventh Circuit's decision in this case, the Sixth Circuit Court of Appeals has held that the failure

to pursue a meritorious grievance is, of itself, a " . . . clear example of arbitrary conduct on the Union's part."

> Ruzicka v. General Motors Corp., 523 F.2d 306, 310 (6th Cir. 1975).

In some of its other decisions, the Seventh Circuit has acknowledged that the unexplained failure to pursue a meritorious grievance is arbitrary conduct.

> Baldini v. Local Union No. 1095, UAW, 581 F.2d 145, 151 (7th Cir. 1978);
> Melendy v. United States Postal Service, 589 F.2d 256, 259 (7th Cir. 1978).

If a reasonable doubt exists as to whether the Union's conduct has been arbitrary, then summary judgment on that issue should not have been granted.

> United States v. Diebold, Inc., 369 U.S. 654, 82 S.Ct. 993 (1962);
> Baldini v. Local Union No. 1095, UAW, supra.

The Seventh Circuit stated, in its opinion in this case, that the Union was

continuing to pursue a similar claim for contributions from SBL, Inc. in the Hammond litigation, indicating that that might be an excuse for the Union in not pursuing arbitration of the pension dispute with Amsted. However, the Union has not offered any evidence in this case suggesting that it had delayed for five (5) years in seeking arbitration with Amsted because of the fact that a similar claim is pending against SBL, Inc. in the Hammond litigation. In any event, for more than one (1) year prior to September 28, 1981, the Union had not taken action against SBL, Inc. in the Hammond litigation, as a result of which it was ordered to show cause why the case should not be dismissed.

The Union's failure to explain its five (5) year delay in seeking to arbitrate the pension dispute with Amsted is, as a matter of law, arbitrary conduct and

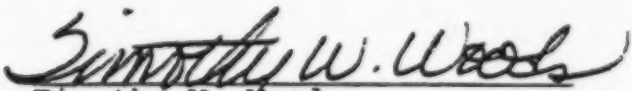
a violation of the Union's duty of fair representation. At the very least, a question of fact exists on this issue.

V

CONCLUSION

For all of the foregoing reasons, this Court should grant this petition for certiorari and enter an appropriate order.

Respectfully submitted,



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Appendix

TABLE OF CONTENTS
TO APPENDIX

	Page
Seventh Circuit Court of Appeals Unofficial Report.....	1
Seventh Circuit Court of Appeals Order of December 2, 1981, modifying previous opinion.....	14
District Court Memorandum and Order of October 22, 1980.....	21
District Court Judgment.....	31

Statutes involved:

28 U.S.C. §1254.....	33
28 U.S.C. §2201.....	33
29 U.S.C. §185.....	34
29 U.S.C. §202.....	36
29 U.S.C. §216.....	38
29 U.S.C. §1001.....	41
29 U.S.C. §1002.....	47
29 U.S.C. §1003.....	48
29 U.S.C. §1132.....	49

In the

United States Court of Appeals

For the Seventh Circuit

No. 80-2654

D. E. BAKER, et al.,

Plaintiffs-Appellants,

v.

AMSTED INDUSTRIES, INCORPORATED, a corporation, and UNITED STEELWORKERS OF AMERICA,

Defendants-Appellees.

No. 80-2760

D. E. BAKER, et al.,

Plaintiffs-Appellees,

v.

AMSTED INDUSTRIES, INCORPORATED, a corporation,

Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Indiana, South Bend Division.
No. 80-C-0079—Allen Sharp, *Judge.*

ARGUED MAY 14, 1981—DECIDED AUGUST 21, 1981

Before SPRECHER, *Circuit Judge,* NICHOLS, *Judge,** and CUDAHY, *Circuit Judge.*

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* The Honorable Philip Nichols, Jr., Judge of the United States Court of Claims, is sitting by designation.

CUDAHY, *Circuit Judge.* The issue on this appeal is whether the district court erred in ruling as a matter of law that the United Steelworkers of America ("Union") did not breach its duty of fair representation in failing to pursue to arbitration with Amsted Industries, Inc. ("Amsted") the question of Amsted's pension funding obligations under a collective bargaining agreement with the Union. We affirm, except as to that portion of the district court's order dismissing the complaint against Amsted without prejudice.

I.

Plaintiffs were employed by Amsted at its South Bend Lathe Division ("South Bend Lathe") when, on July 3, 1975, Amsted sold that division to South Bend Lathe, Inc. ("SBL, Inc.").[1] While employed by Amsted, plaintiffs were represented for collective bargaining purposes by the Union. On October 7, 1974, the Union and South Bend Lathe entered into a three-year collective bargaining agreement that was to be effective from October 7, 1974, through October 6, 1977. Article 14 of this agreement provided for various employee pension and insurance benefits, incorporating by reference a revised pension and insurance plan.

Upon assuming ownership and control of South Bend Lathe, SBL, Inc., agreed to continue the employment of the four plaintiffs and all other Union-represented employees. SBL, Inc., continued to recognize the Union as the exclusive bargaining agent of the employees, and agreed to comply with most of the terms of the October 7, 1974, agreement. SBL, Inc., declined, however, to be obligated by the provisions of Article 14 of the agreement. On June 27, 1975, the president of SBL, Inc., notified the Union that Amsted had agreed to honor its obligations under the pension plan for services by employees prior to the date of sale, but that SBL, Inc.,

[1] SBL, Inc., had been known as LWE, Inc., before it acquired South Bend Lathe.

would provide retirement benefits for service after that date through an employee stock ownership plan.[2]

From early April 1975, through the spring of 1976, the Union conducted extensive negotiations with Amsted and SBL, Inc., concerning the impact of the impending sale on, *inter alia*, pension and insurance benefits, seniority rights and vacation pay.[3]

In the spring of 1976, these negotiations ended without an agreement's being reached concerning, *inter alia*, pension funding obligations for services performed after the date of sale. The Union therefore made a written demand that the pension funding question (together with other contract interpretation disputes) be submitted to binding tripartite arbitration. SBL, Inc., and Amsted both rejected this proposal. Therefore, on April 30, 1976, the Union instituted an action in the United States District Court for the Northern District of Indiana (the "Hammond litigation") to compel tripartite arbitration. On October 1, 1976, in an order without opinion, the district court in the Hammond litigation granted Amsted's motion for summary judgment, "provided, however, that plaintiff is hereby granted leave to reinstitute proceedings against defendant Amsted Industries, Incor-

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[2] In its June 27, 1975 letter, SBL, Inc., apparently also agreed to continue the insurance plan for active employees, such as the four plaintiffs, and to provide insurance coverage for those employees who would retire from SBL, Inc., after the date of the sale.

[3] Although Amsted and the Union were unable to resolve their differences completely, it was understood that Amsted would make contributions to the pension fund for service rendered by bargaining unit employees prior to the July 3, 1975, sale date. In addition, Amsted agreed to administer the pension plan and to pay retirement benefits both to employees who retired prior to July 3, 1975, and to those employees who were eligible to retire as of that date, even if they continued their employment with SBL, Inc. Therefore, the only dispute that appears to remain concerns Amsted's pension funding obligations for services performed after the date of sale.

porated, in the event that said defendant fails to arbitrate bilaterally with [the Union]."[4]

After the October 1, 1976, order, although plaintiffs made several inquiries concerning the progress of arbitration between Amsted and the Union, the Union failed to pursue the pension dispute to arbitration with Amsted.[5] Therefore, on March 27, 1980, plaintiffs filed this action against Amsted and the Union, seeking to have their rights declared as to future pension and insurance benefits.

On October 22, 1980, the district court entered an order granting summary judgment for both defendants. The bases for that order, as set forth by the district court in an accompanying memorandum, were the undisputed facts (1) that the Union had diligently negotiated with Amsted concerning the pension and insurance rights of the former South Bend Lathe employees, (2) that the Union had attempted to obtain an agreement from Amsted and SBL, Inc., to submit the pension and insurance dispute to tripartite arbitration, (3) that the Union had sued both employers in the Hammond litigation, and (4) that the claims against Amsted and SBL, Inc., were substantially identical, thereby justifying the Union's decision to await the termination of the litigation against SBL, Inc., before proceeding further against Amsted. On such facts, the district court concluded that the Union had not breached its duty of fair representation.[6]

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[4] In 1977, the Union and SBL, Inc., each filed motions for summary judgment in the Hammond litigation and supported their respective motions with briefs, affidavits and documentary evidence. The district court denied both of those motions based on its finding that there were disputed issues of material fact. The Hammond litigation is still pending before the district court.

[5] After the instant action was threatened, the Union demanded that Amsted bilaterally arbitrate the pension dispute. On April 2, 1980, Amsted refused to arbitrate.

[6] The district court's order also provided that "because the Hammond litigation involving the new employer prevents the

(Footnote continued on following page)

II.

Section 9(a) of the National Labor Relations Act declares that a union designated by the majority of employees in an appropriate unit "shall be the exclusive representative of all employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." 29 U.S.C. § 159(a) (1976). Even employees who may have preferred a different representative, or none at all, are bound by the choice of a majority of their fellow workers. *Case v. NLRB*, 321 U.S. 332 (1944). An agreement between an employer and an individual employee concerning the terms and conditions of employment is ineffective both as a bar to collective bargaining, *Case v. NLRB*, *supra*, and as a waiver of benefits under an existing collective bargaining agreement. *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944). Thus, terms and conditions of employment can be arranged only by the majority representative, and the rules written into the collective bargaining agreement become the law of the plant for all employees. And federal law allows a collective bargaining agreement to vest the union with exclusive authority to enforce the contractual rights of all employees in the bargaining unit. *See* 29 U.S.C. § 159(a) (1970); *Humphrey v. Moore*, 375 U.S. 335 (1964). In these respects, "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . . ." *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 202 (1944).

It early became apparent that majority representatives in the sphere of industrial relations were no less capable of misusing their considerable authority than their counterparts in the political arena. Therefore, in

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[6] *continued*
employees from bringing a new action against Amsted, the statute of limitations applicable to the employees' claim against Amsted continues to be tolled until the Hammond litigation terminates."

rough analogy to the limits imposed on legislative power by the equal protection clause of the Constitution, the courts have imposed on majority representatives a responsibility equal in scope to their authority, "the responsibility and duty of fair representation." *Hines v. Anchor Motor Freight*, 424 U.S. 554, 564 (1976) (citation omitted).[7] While this duty of fair representation was originally conceived in the context of racial discrimination,[8] it has been applied to reach all union conduct toward a member of a collective bargaining unit that is "arbitrary, discriminatory, or in bad faith." *Clayton v. Automobile Workers*, 49 U.S.L.W. 4550, 4554 n.24 (May 26, 1981); *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). *See, e.g., Robesky v. Qantas Empire Airways, Ltd.*, 573 F.2d 1082 (9th Cir. 1978) (where an employee rejected employer's settlement offer believing that her grievance would be arbitrated, failure of union to inform employee that her grievance had been withdrawn from arbitration might constitute breach of duty).

Although the fair representation doctrine has been a part of our jurisprudence for nearly four decades,[9] its

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[7] In *Steele*, the Court concluded that the bargaining representative has "at least as exacting a duty to represent equally the interests of the members of the craft [i.e., the unit] as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates." 323 U.S. at 202. The Court emphatically stated that the duties of a bargaining representative extended to all employees in a unit, and that the representative must represent the employees' interests "fairly and impartially." *Id.* at 204.

[8] In *Steele*, the Court held that the designated bargaining representative, which excluded black employees from its membership, violated the duty of fair representation by negotiating a seniority agreement that had the purpose and effect of placing black employees at the bottom of the seniority list.

[9] First recognized with respect to the railroad industry in *Steele*, the duty of fair representation has been applied to bargaining representatives in all industries reached by the National Labor Relations Act since *Syres v. Oil Workers*, 350 U.S. 892 (1955).

scope has not been easily susceptible of precise delineation. *See* Morgan, Fair is Foul and Foul is Fair, Ruzicka and the Duty of Fair Representation in the Circuit Courts, U. of Toledo L. Rev. 335 (1980); Note, Determining Standards for a Union's Duty of Fair Representation: The Case for Ordinary Negligence, 65 Cornell L. Rev. 634 (1980). Like any judicially-created doctrine of broad purpose, it must evolve gradually in response to the circumstances of individual cases. But the delineation of the doctrine is made especially difficult by the diverse and divergent interests it must seek to accommodate. Where, as in this case, a union has negotiated a collective bargaining agreement that clothes it with exclusive authority to process employees' grievances against the employer, the union bears a heavy responsibility for processing such claims fairly and conscientiously, since individual employees (including those who opposed representation by their statutorily-imposed agent) are barred from individually seeking redress from their employer's wrongful conduct. *See Hines*, 424 U.S. at 562-63, 571. The weighty interest of the individual employee must be balanced, however, against the potentially conflicting interests of other employees and of the group as a whole. "The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit." *Vaca*, 386 U.S. at 182.

The duty to represent all employees fairly and effectively necessarily requires that the Union have substantial discretion in deciding whether and in what manner a particular grievance should be pursued. While the duty of fair representation must stand firmly as a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law," *Vaca*, 386 U.S. at 182, it must not operate to vitiate the strengths inherent in collective action. Thus, in deciding whether and to what extent a particular grievance should be pursued, the Union must be allowed the discretion to balance many considerations and interests, including the effect of various resolutions of the grievance on other employees,

the requirements of group organization and coherence, the desire for consistent treatment of similar claims, the appropriate allocation of limited resources for pursuing both individual and group claims, the maintenance of the Union's bargaining power and the necessity of maintaining an effective continuing relationship with the employer. *See Vaca*, 386 U.S. at 182; *Humphrey*, 375 U.S. at 341, 349-50; Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601 (1956); Note, Duty of Fair Representation: A Theoretical Structure, 51 Tex. L. Rev. 1119 (1973). In addition, the fair representation doctrine must be limited to avoid inappropriate interference with the National Labor Relations Board's exclusive jurisdiction over unfair labor practices. *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971).[10]

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[10] The Board and the courts exercise concurrent jurisdiction over fair representation claims. *See Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963) (union's breach of its statutory duty of fair representation violates N.L.R.A. § 8(b), as amended). In *Vaca*, the Court emphasized that the Board's "tardy" assumption of jurisdiction over fair representation cases does not support the assumption that "Congress, when it enacted §8(b) in 1947, intended to oust the courts of their traditional jurisdiction to curb arbitrary conduct by the individual employee's statutory representative." 386 U.S. at 183. Thus, the decision whether a particular claim should be recognized as being within the exclusive competence of the Board "must depend upon the nature of the particular interest being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies." *Id.* at 180.

While claims that primarily concern the proper interpretation and application of internal union regulations raise sensitive labor relations questions that are properly within the exclusive domain of the Board's expertise, *Lockridge*, 403 U.S. at 291-301, claims that arise primarily out of the judicially-developed duty of fair representation do not implicate "the need to avoid conflicting rules of substantive law in the labor relations area [or suggest] the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose. . . [F]air representation

(Footnote continued on following page)

There are yet other interests to be considered because, in an employee's § 301 action against his employer, proof of breach of the union's duty can operate to reactivate a grievance otherwise barred by the collective bargaining agreement or reopen an otherwise final and binding arbitration award. The integrity of such private settlement procedures, which are central to our system of industrial relations, might be undermined if the fair representation doctrine is too broadly or freely applied in § 301 actions against employers. Thus, in response to this concern, the Court in *Hines* stated that proof of breach of duty by the union "involves more than demonstrating mere errors in judgment." 424 U.S. at 570-71. *See also United Parcel Service, Inc. v. Mitchell*, 49 U.S.L.W. 4378 (April 20, 1981).[11]

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[10] *continued*

duty suits often require review of the substantive positions taken and policies pursued by a union in its negotiation of a collective bargaining agreement and in its handling of the grievance machinery; as these matters are not normally within the Board's unfair labor practice jurisdiction, it can be doubted whether the Board brings substantially greater expertise to bear on these problems than do the courts which have been engaged in this type of review since the *Steele* decision." *Vaca*, 386 U.S. at 180-81.

[11] The *Mitchell* Court stated:

> [T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. . . . The processing machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.' *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). Although the present case involves a fairly mundane and discrete wrongful discharge complaint, the grievance and arbitration procedure often processes disputes involving interpretation of critical terms in the collective bargaining agreement affecting the entire relationship between the company and union. *See, e.g., Humphrey v. Moore*, 375 U.S. 335 (seniority rights of all employees). This system, with its heavy emphasis on grievance, arbitration, and the "law of the shop," could easily become unworkable if a

(Footnote continued on following page)

The task of properly balancing these interests is further complicated because the relative weight that each interest should be assigned may vary according to the union functions implicated by the employee's particular claim. Thus, it may be appropriate to allow a union greater deference in negotiating a collective bargaining agreement, *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953),[12] than in performing largely ministerial func-

[11] *continued*

decision which has given "meaning and content" to the terms of an agreement, and even affected subsequent modifications of the agreement, could suddenly be called into question as much as six years later.

49 U.S.L.W. at 4380. The *Mitchell* Court held that New York's 90-day limitation period for bringing an action to vacate an arbitration award was applicable to an employee's § 301 and breach of duty suit which would have had the effect, if successful, of reopening an otherwise binding arbitration decision. Where such a short limitation period is applicable, the employer's finality interest will be less weighty. It is possible, however, that much longer limitation periods will govern § 301 and breach of duty suits that do not challenge the correctness of an arbitration award (e.g. where the union has failed to pursue a grievance to arbitration). And, of course, the employer also has a reasonable expectation that his commitment of time and resources to the processing of grievances in accordance with the provisions of the contract will not be routinely frustrated by the union's improper processing or presentation of employees' grievances.

[12] The *Huffman* Court stated:

> A major responsibility of negotiators is to weigh the relative advantages and disadvantages of differing proposals. . . . The bargaining representative . . . is responsible to, and owes complete loyalty to, the interests of all whom it represents. . . . Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

345 U.S. at 338.

tions of contract administration. *See Robesky v. Qantas, supra; Ruzicka v. General Motors Corp.*, 523 F.2d 306 (6th Cir. 1976) (union failed to file papers in a grievance proceeding in a timely manner); Summers, The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation, 126 U. Pa. L. Rev. 251 (1977). And, it may also be that the strength of an employee's finality interest will vary according to the time and resources committed by the employer to settlement of the particular grievance through the procedures set forth in the collective bargaining agreement. *See* note 11, *supra.*

It is entirely possible that the courts are unequal to the task of striking the proper balance between these many interests and their infinite permutations and combinations. But the very complexity of this task also suggests the difficulty of stating a single rule that will provide an appropriate standard of decision in every case. We believe it is preferable instead to consider each claim in light of the interests it implicates in deciding whether the challenged union conduct was "arbitrary, discriminatory or in bad faith." *Vaca*, 386 U.S. at 190.

III.

Plaintiffs maintain here that the Union breached its duty of fair representation by failing to arbitrate the pension dispute with Amsted. But that dispute concerns the question whether Amsted may be obligated to make contributions to the pension fund for work performed after the sale of South Bend Lathe to SBL, Inc. (or possibly to provide that the buyer make such contributions). And the Union is continuing to pursue a similar claim for contributions from SBL, Inc., in the Hammond litigation. If the Union were to prevail against SBL, Inc., in that litigation (and the subsequent arbitration), then SBL, Inc., would presumably be obligated by the pension funding provisions of the 1974 contract and plaintiffs will not have suffered any injury as a result of the Union's failure to arbitrate with Amsted.

There is no suggestion in this case of particularized discrimination against or hostility toward the plaintiff employees. Moreover, the decision challenged in this case obviously implicates substantial interests of the Union in its capacity as representative of the entire bargaining unit. Even if the Union's litigation strategy were subsequently determined to be misconceived, it would be excessively intrusive into Union decision-making for the courts to decide, in the absence of bad faith or egregious conduct, whether the Union has pursued the tactics most appropriate to the aggrieved employees' needs. *See Hines*, 424 U.S. at 554 (breach of duty involves "more than demonstrating mere errors in judgment"); *Baldini v. United Automobile Workers*, 581 F.2d 145, 151 (7th Cir. 1978); *Ruzicka*, 523 F.2d at 316 (McCree, J., concurring).

The district court therefore properly determined that the Union did not breach its duty of fair representation by failing to pursue the pension funding claim to arbitration with Amsted.[13]

IV.

Having found that the Union did not breach its duty of fair representation, the district court properly granted defendants' motions for summary judgment. In its October 22, 1980, order granting summary judgment, however, the district court improperly included the caveat that "Plaintiffs' complaint is dismissed without prejudice to the extent that Plaintiffs may reinstitute proceedings against the Defendant [Amsted] after the termination of the Hammond litigation." Since the Union has not breached its duty of fair representation, plaintiffs' claim against Amsted was properly dismissed,

[13] The only issue presented and argued in plaintiffs' brief was whether the district court erred in ruling as a matter of law that the Union breached its duty of fair representation. Plaintiffs therefore waived any challenge to the district court's disposition of their ERISA claim. *See Cannon v. Teamsters, Local 627*, No. 80-1103, slip op. at 7-8 (7th Cir. August 21, 1981).

because an employee may not prevail on a § 301 claim against his employer unless he carries the burden of demonstrating breach of duty by the Union. *Hines*, 424 U.S. at 570-71; *Melendy v. United States Postal Service*, 589 F.2d 256, 258-60 (7th Cir. 1978). If the Union in some manner breaches its duty at some future time, plaintiffs would then have a cause of action against the Union (and possibly against Amsted), but such future breach is not an appropriate basis for reinstituting the particular claim that we have decided today was properly dismissed by the district court.

Accordingly, the order of the district court granting defendants' motions for summary judgment is affirmed. That aspect of the district court's order dismissing plaintiffs' complaint against Amsted *without prejudice to the extent that the Plaintiffs may reinstitute proceedings against Amsted after the termination of the Hammond litigation* is vacated and remanded, with instructions to dismiss the complaint with prejudice in its entirety.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 4969—Midwest Law Printing Co., Inc., Chicago—8-21-81—350

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

December 2, 1981.

Before

Hon. ROBERT A. SPRECHER, Circuit Judge

Hon. PHILIP NICHOLS, JR., Judge*

Hon. RICHARD D. CUDAHY, Circuit Judge

D. E. BAKER, CLIFF TAYLOR, CARNEY LONG, and TED JAMES, individually, and on behalf of other employees of South Bend Lathe,	)	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
Plaintiffs-Appellants and Cross-Appellees,	)	
Nos. 80-2654 & 80-2760	)	No. 80-C-0097
vs.	)	
AMSTED INDUSTRIES, INCORPORATED, a corporation, and	)	Allen Sharp, Judge.

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*/ The Honorable Philip Nichols, Jr., Judge of the United States Court of Claims, is sitting by designation.

O R D E R

This case is before the Court on petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by Plaintiffs-Appellants, Cross-Appellees. On consideration of the petition for rehearing the court on its own motion has adopted the following revisions in its opinion issued August 21, 1981:

On page 12 thereof, insert "§301" in the last line between "Plaintiffs'" and "claim", so that the sentence now reads:

> . . . Since the Union has not breached its duty of fair representation, plaintiffs' § 301 claim against Amsted was properly dismissed, because an employee may not prevail on a § 301 claim against his employer

unless he carries the burden of demonstrating breach of duty by the Union. . . .

On page 12 thereof, delete footnote 13 in its entirety.

On page 13 thereof, delete the last paragraph and substitute the following:

> As to plaintiffs' ERISA claim, however, we affirm the district court's dismissal without prejudice to the extent that plaintiffs may reinstitute proceedings against Amsted after the termination of the Hammond litigation. As plaintiffs pointed out at oral argument, the Supreme Court's recent decision in Barrentine v. Arkansas-Best Freight Systems, Inc.,

____ U.S. ____ 101 S.Ct. 1437 (1981), may cast doubt on the assumption, previously shared by all parties in this case, that a showing of a breach of the Union's duty of fair representation is a prerequisite to suit under ERISA as well as under § 301. Because the ERISA issue was not adequately briefed or argued before this court, we express no opinion as to the merits of plaintiffs' ERISA claim. We note, however, that the district court's apparent assumption that plaintiffs must exhaust their contractual remedies before instituting suit under ERISA

seems well supported in the case law. See e.g., Challenger v. Local Union No. 1 of International Bridge, Structural, and Ornamental Ironworkers, 619 F.2d 645 (7th Cir. 1980); Haeberle v. Board of Trustees, 624 F.2d 1132, 1134 n. 3 (2d Cir. 1980); Amato v. Bernard, 618 F.2d 559, 566-68 (9th Cir. 1980).

Accordingly, those portions of the district court's opinion granting defendants' motions for summary judgment against the Union and dismissing plaintiffs' ERISA claim without prejudice are affirmed. Those aspects of the district court's order granting summary judgment and dismissing

> plaintiffs' § 301 claim against Amsted without prejudice to the extent that the Plaintiffs may reinstitute proceedings against Amsted after the termination of the Hammond litigation are vacated and remanded, with instructions to dismiss the § 301 claim with prejudice in all respects.

On consideration of the petition for rehearing and suggestion for rehearing en banc, no judge in active service having requested a vote thereon and all judges on the original panel having voted to deny rehearing, accordingly.

IT IS ORDERED that the aforesaid petition for rehearing be and the same is hereby, DENIED.

The opinion, as published in the

Federal Reporter, Second Series, shall bear the notation "As Modified on Denial of Rehearing."

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

SOUTH BEND DIVISION

D. E. BAKER, CLIFF TAYLOR, CARNEY LONG, and TED JAMES, individually, and on behalf of other employees of South Bend Lathe	)	
Plaintiffs	)	
v.	)	No. S 80-79
AMSTED INDUSTRIES INCORPORATED, a corporation, and UNITED STEELWORKERS OF AMERICA	)	
Defendants	)	

MEMORANDUM AND ORDER

This is a 28 U.S.C. § 2201 declaratory judgment action brought by employees against their union and their former employer. The plaintiffs seek to have this Court interpret a labor contract. Specifically, they seek a clarification of their pension and insurance rights,

including a clarification of any impact on those rights by the Employee Retirement Income Security Act (29 U.S.C. §§ 1001-1381) (ERISA). The parties agree that, in order to succeed on the merits of their case, the plaintiffs must prove both that the employer has misinterpreted the contract and that the union has breached its duty of fair representation under 29 U.S.C. § 185.

The employer, Amsted Industries, Inc., has filed a Motion to Dismiss or for Summary Judgment. Amsted argues that the plaintiffs' claim is barred by the statute of limitations, that the complaint fails to state a claim under ERISA by not specifying the section allegedly violated, that the plaintiffs have not exhausted their contractual remedies, and that the complaint fails to state a claim under 29 U.S.C. § 185 by failing to plead specific facts to show that the union

United Steelworkers of America) has breached its duty of fair representation. Finally, Amsted argues that it should be granted summary judgment because it is undisputed that the union fulfilled its duty of fair representation.

Amsted sold its South Bend Lathe Division, where the plaintiffs were employed, on July 3, 1975. Prior to and in anticipation of that sale, the union had requested Amsted to bargain about the pension and insurance rights of the employees who would be affected by the sale. Bargaining sessions were held. Arbitration was sought. Eventually, the union brought suit, in the Hammond Division of this Court against both Amsted and the new employer seeking a court order requiring three-party arbitration of the pension and insurance claims. Amsted was dismissed from that suit on Judge McNagny's order of October 1, 1976, which

provided:

> IT IS THEREFORE ORDERED that the motion for summary judgment of defendant, Amsted Industries, Incorporated, be and hereby is granted, provided, however, that plaintiff is hereby granted leave to reinstitute proceedings against defendant Amsted Industries, Incorporated, in the event that said defendant fails to arbitrate bilaterally with plaintiff.

The bilateral arbitration has never occurred. Neither has the union reinstituted proceedings against Amsted.

The arguments involving sufficiency of the complaint and exhaustion of contractual remedies can be easily disposed of. Under the fair notice standard of the Federal Rules of Civil Procedure, the

plaintiffs have stated a claim under both ERISA and 29 U.S.C. § 185. The affidavits filed make it clear that the plaintiffs have exhausted all available contractual remedies. The complaint should not be dismissed for insufficiency or failure to exhaust contractual remedies.

The next argument which must be addressed is the summary judgment argument. The question which must be decided is whether there is a genuine issue of material facts as to whether the union has breached its duty of fair representation. There is none. The affidavits filed show clearly that the union vigorously pursued all available remedies until October 1, 1976. The only remaining issue is whether the union could be found to have breached its duty of fair representation by failing to reinstitute proceedings against Amsted when the

arbitration required by the October 1, 1976 order failed to materialize.

The union's failure to reinstitute proceedings could not be found to be a breach of the union's duty of fair representation in the particular facts of this case. The Hammond litigation was brought against both Amsted and the new company for the same relief based on the same provisions of the contract. The two employers were sued together because the collective bargaining argument (sic) expressly applied to both Amsted and its successors. The union is not pursuing two independent claims, but one claim against two employers. Judgment has, in effect, been entered against one of the two employers. The lawsuit is still pending as to the second employer. Because the claims against the two employers are so closely related as to be the same claim, the union is fully justified

in awaiting the termination of the Hammond litigation against the new employer before proceeding further against Amsted. The employees which the union represents should not be allowed to interfere with the union's prosecution of that Hammond lawsuit. In a case such as this, where an old employer has been replaced with a new employer, where the union's claims against the two employers are based on the same contract, and where the asserted liability of the two employers is identical, the union's good faith pursuit of its claim against one employer must be construed to have the same effect on individual employees' right to sue as a good faith pursuit of the same claim against the other employer. This is especially true in light of the nature of the union's litigation against the two employers. The union is attempting to require the

employers to submit to arbitration which the union believes to be required by the collective bargaining agreement. To allow the employees to continue this lawsuit would effectively avoid the exhaustion of available contractual remedies. The plaintiffs are required to exhaust contractual remedies. Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965), Baldini v. Local Union 1095, UAW, 581 F.2d 145 (7th Cir. 1978). Accordingly, the employees are barred from instituting independent suits against either employer until the Hammond litigation is terminated.

There is no genuine issue of material fact as to whether the union has breached its duty of fair representation. The union has not breached its duty of fair representation. Accordingly, summary judgment should be granted to the defendants.

A final note is in order on the

statute of limitation argument. If the two employers breached the labor contract by transferring the company without appropriately protecting the employees' pension and insurance benefits, then that breach took place on July 3, 1975. The statute of limitations, however, was tolled while the union sought to enforce the contract. Smart v. Ellis Trucking Co., 580 F.2d 215 (6th Cir. 1978), Metropolitan Paving Co. v. International Union of Operating Engineers, 439 F.2d 300 (10th Cir. 1971), Slater v. Staffel, 140 Ind.App. 131, 221 N.E.2d 688 (1966). Furthermore, because the Hammond litigation involving the new employer prevents the employees from bringing an action against Amsted, the statute of limitations applicable to the employees' claim against Amsted continues to be tolled until the Hammond litigation terminates.

IT IS ORDERED that the defendants

are GRANTED summary judgment. The complaint is DISMISSED, without prejudice to the extent that the plaintiffs may reinstitute proceedings against the defendant after the termination of the Hammond litigation.

Enter October 22, 1980.

/s/ Allen Sharp
JUDGE, UNITED STATES
DISTRICT COURT.

cc: T. Woods
L. Summers
A. Hand
W. Schmelling
P. Singleton
order book

JUDGMENT ON DECISION BY THE COURT

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF INDIANA

CIVIL ACTION FILE
NO. S80-79

D. E. BAKER, CLIFF TAYLOR, CARNEY LONG and TED JAMES, individually and on behalf of other employees of South Bend Lathe

vs.

AMSTED INDUSTRIES INCORPORATED, a corporation, and UNITED STEELWORKERS OF AMERICA

JUDGMENT

This action came on for hearing before the Court, Honorable Allen Sharp, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that Defendants are granted Summary Judgment

and Plaintiffs' complaint is dismissed without prejudice to the extent that the Plaintiffs may reinstute (sic) proceedings against the Defendant after the termination of the Hammond litigation.

Dated at SOUTH BEND, INDIANA, this 22nd day of OCTOBER, 1980.

RICHARD E. TIMMONS
Clerk of Court

BY /s/ Terece M. Hinkle
Deputy Clerk

STATUTES INVOLVED

28 U.S.C. §1254. Courts of appeals; certiorari; appeal; certified questions.

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> * * *

28 U.S.C. §2201. Creation of remedy.

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505

or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

29 U.S.C. §185. Suits by and against labor organizations.

Venue, amount, and citizenship

(a) Suits for violation of contacts between an employer and a labor organization representing employees in an industry affecting commerce as defined

in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * *

Jurisdiction

(c) For the purpose of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal

office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

* * *

29 U.S.C. §202. Congressional finding and declaration of policy.

(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce

to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic service in households affects commerce.

(b) It is declared to be the policy of this chapter,

through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

29 U.S.C. §216. Penalties; civil and criminal liability; injunction proceedings terminating right of action; waiver of claims; actions by Secretary of Labor; limitation of actions; savings provision.

* * *

(b) Any employer who violates the provisions of section 206 or section 207 of this

title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which

such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount

of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection.

* * *

29 U.S.C. §1001. Congressional findings and declaration of policy.

(a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of

employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the

mails and instrumentalities
of interstate commerce;
that owing to the lack of
employee information and
adequate safeguards concern-
ing their operation, it is
desirable in the interests
of employees and their
beneficiaries, and to pro-
vide for the general welfare
and the free flow of commerce,
that disclosure be made and
safeguards be provided with
respect to the establishment,
operation, and administration
of such plans; that they sub-
stantially affect the revenues
of the United States because
they are afforded preferential
Federal tax treatment; that
despite the enormous growth
in such plans many employees

with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue

of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries

of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

29 U.S.C. §1002. Definitions.

* * *

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

(6) The term "employee" means any individual employed by an employer.

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any

type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

* * *

29 U.S.C. §1003. Coverage.

(a) Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained—

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or

* * *

29 U.S.C. §1132. Civil enforcement.

Persons empowered to bring civil action

(a) A civil action may be brought—

(1) by a participant or beneficiary—

* * *

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

* * *

(3) by a participant, beneficiary, or fiduciary

Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

Amount in controversy; citizenship of parties

(f) The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

Attorney's fees and costs; awards in actions involving delinquent contributions

(g)(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee

and costs of action to either party.

* * *

Opposition

Supreme Court, U.S.
FILED
APR 21 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1624

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

D. E. BAKER, CLIFF TAYLOR, CARNEY LONG, and TED JAMES, individually, and on behalf of other employees of South Bend Lathe,

Petitioners,

VS.

AMSTED INDUSTRIES INCORPORATED, a corporation, and UNITED STEELWORKERS OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT AMSTED INDUSTRIES INCORPORATED'S BRIEF IN OPPOSITION

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PAGE

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 2

A. Amsted's Sale Of Its South Bend Lathe Division 2

B. The Union's Trilateral Arbitration Demand And Suit 4

C. Proceedings Before The District Court 5

D. Proceedings Before The Appellate Court 6

REASONS FOR DENYING THE WRIT 7

A. Petitioners' ERISA Argument Is Not Properly Before The Court 7

B. The Seventh Circuit's Decision Affirming The District Court's Dismissal Of Petitioners' Unfair Representation Claim Is Consistent With Established Case Law 10

CONCLUSION 13

SUPPLEMENTAL APPENDIX ..... A

TABLE OF AUTHORITIES

PAGE

Cases

Adams v. *Anheuser-Busch, Inc.*, Nos. 81-1345 and 81-1348 (3d Cir., January 11, 1982) 8

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970) 9

Amato v. *Bernard*, 618 F.2d 559 (9th Cir. 1980) 8

Baldini v. *Local Union No. 1095, UAW*, 581 F.2d 145 (7th Cir. 1978) 11, 12

Barrentine v. *Arkansas Best Freight System, Inc.*, 450 U.S. 728 (1981) 7, 8

Boynton v. *Virginia*, 364 U.S. 454 (1960) 10

California v. *Taylor*, 353 U.S. 553 (1957) 9

Carpenters Local Union No. 1846 v. *Pratt-Farnsworth, Inc.*, 511 F.Supp. 509 (E.D. La. 1981) 8

Challenger v. *Ironworkers Local Union No. 1*, 619 F.2d 645 (7th Cir. 1980) 8

Delta Airlines, Inc. v. *August*, 450 U.S. 346 (1981) 9

Duignan v. *United States*, 274 U.S. 195 (1927) 9

Haeberle v. *Board of Trustees*, 624 F.2d 1132 (2d Cir. 1980) 8

Hines v. *Anchor Motor Freight*, 424 U.S. 554 (1976) .. 11, 12

International Molders and Allied Workers Union v. *Aquarius Shoe Corp.*, 511 F.Supp. 361 (E.D. Mo. 1981) 8

Lawn v. *United States*, 355 U.S. 339 (1958) 9

Melendy v. *United States Postal Service*, 589 F.2d 256 (7th Cir. 1978) 11

	PAGE
Vaca v. *Sipes*, 386 U.S. 171 (1967)	11
Youakim v. *Miller*, 425 U.S. 231 (1976)	9
Statutes	
Section 301, Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185	1, 5, 6, 8
Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.*	2, 5, 8
Miscellaneous	
R. Stern and E. Gressman, *Supreme Court Practice*, § 6.27 (5th Ed. 1978)	10

No. 81-1624

IN THE

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OCTOBER TERM 1981

D. E. BAKER, CLIFF TAYLOR, CARNEY LONG, and TED JAMES, individually, and on behalf of other employees of South Bend Lathe,

Petitioners,

VS.

AMSTED INDUSTRIES INCORPORATED, a corporation, and UNITED STEELWORKERS OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT AMSTED INDUSTRIES INCORPORATED'S BRIEF IN OPPOSITION

Petitioners ask this Court to reconsider a decision of the United States Court of Appeals for the Seventh Circuit under Section 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185 ("Section 301"), which held that the District Court properly entered summary judgment in favor of Respondents Amsted Indus-

tries Incorporated ("Amsted") and United Steelworkers of America (the "Union") on Petitioners' action against Amsted for breach of its collective bargaining agreement with the Union and against the Union for breach of its duty of fair representation. Petitioners contend that the Seventh Circuit's decision conflicts with decisions of this Court and other circuit courts in its holding on their Section 301 claim, and also in its disposition of Petitioners' claim under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"). As discussed more fully herein, the Seventh Circuit's decision is consistent with existing decisions of this Court and other circuit courts, and the petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

A. Amsted's Sale Of Its South Bend Lathe Division

Prior to July, 1975, Amsted owned and operated its South Bend Lathe Division, in South Bend, Indiana. Amsted's hourly employees at this facility, including all Petitioners, were represented for purposes of collective bargaining by the Respondent Union and its Local No. 1722 (R. 2, ¶ 2).*

On October 7, 1974, Amsted had entered into a collective bargaining agreement with the Union which set forth the terms and conditions of employment, including certain pension and insurance benefits, for Amsted's South Bend Lathe employees (R. 1).

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* References to "R. " are to documents in the transcript of record filed with the Clerk of the Seventh Circuit. References to "A. " are to pages of the appendix to Petitioners' petition for writ of certiorari. References to "Supp. App. " are to the supplemental appendix submitted with this brief.

On July 3, 1975, Amsted sold its South Bend Lathe Division to a new corporation which began doing business on that date as "South Bend Lathe, Inc." ("SBL"). After the sale, Amsted no longer operated or had any connection with the former South Bend Lathe Division. (R. 2, ¶¶ 3, 3(d)).

For several months before Amsted's sale of its plant, representatives of Amsted and the Union had conferred as to the effects of a sale on the employees and the collective bargaining agreement (R. 2, ¶ 3). On April 10, 1975, Amsted wrote to the President of Local 1722 stating that Amsted would honor all of its legal obligations (R. 2, Ex. C).

On June 27, 1975, the President of SBL wrote to the Union and clarified his company's intentions with respect to the operation of the new SBL facility. SBL refused to continue in effect the entire collective bargaining agreement with the Union, but agreed to bargain with the Union and proposed the terms for a new agreement. As to the pension plan, SBL stated that Amsted had agreed to honor all its obligations under the plan for service prior to the date of the sale, and that SBL would institute its own employee stock ownership plan in lieu of the prior pension plan (R. 2, Ex. E).

Thereafter, on August 19, 1975, Amsted wrote to the Pension Benefit Guarantee Corporation ("PBGC"), the federal agency charged with guaranteeing the payment of pension benefits to plan participants and their beneficiaries, informed it of the sale of the facility to SBL, and stated that the pension plan would continue to be funded by Amsted for service credit earned by its employees prior to the July 3, 1975 sale (R. 2, Ex H). All current and retired employees were individually informed by letter from Amsted dated August 21, 1975 as to the continuation of the

pension plan for service prior to the sale, as well as the termination of Amsted's insurance plans which were then being provided by the new employer, SBL (R. 2, Exs. I, J).

B. The Union's Trilateral Arbitration Demand And Suit

On October 31, 1975, a Union International Staff Representative and the Local No. 1722 President wrote to both Amsted and SBL requesting joint negotiation concerning coordination of pension and insurance benefits between Amsted and SBL (R. 2, Ex. L). On November 7, 1975 Amsted stated its willingness to resolve the issue with the Union, but not jointly with SBL (R. 2, Ex. M).

On March 23, 1976, counsel for the Union wrote jointly to Amsted and SBL and demanded that the pension and insurance issues be submitted to "tripartite arbitration" amongst the Union, Amsted and SBL (R. 2, Ex. P). Amsted responded that it was not required to engage in trilateral arbitration and would not do so (R. 2, Ex. Q).

The Union then filed suit in the United States District Court for the Northern District of Indiana, Hammond Division, seeking to compel Amsted and SBL to engage in trilateral arbitration on the issue of coordination of pension and insurance plans (R. 2, ¶3(w); R. 4c).

Amsted filed a motion for summary judgment, and on October 1, 1976, the District Court entered judgment for Amsted, and stated that the Union would have "leave to reinstitute proceedings against [Amsted] in the event that [Amsted] fails to arbitrate bilaterally" (Supp. App. A). The District Court order did not, contrary to the numerous misstatements made by Petitioners (petition pp. i, iii, 8, 14, 18), either "order" or direct that Amsted and the Union go to arbitration.*

* The Union's action against SBL continued and is now awaiting trial.

C. Proceedings Before The District Court

On March 27, 1980, Petitioners filed their complaint against Amsted and the Union in the United States District Court for the Northern District of Indiana, South Bend Division. The complaint asserted jurisdiction pursuant to Section 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185 ("Section 301"), and the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"), and also sought declaratory relief pursuant to the Declaratory Judgments Act, 28 U.S.C. §§ 2201-2202 (R. 1).

On May 30, 1980, Amsted filed a motion to dismiss or for summary judgment (R. 2). Amsted raised several grounds for dismissal of Petitioners' action against it, including the failure to state a claim upon which relief could be granted under either Section 301 or ERISA, as well as the untimeliness of Petitioners' claims under the separate statutes of limitations applicable to Section 301 and ERISA claims (R. 2).

On or about May 30, 1980, the Union filed an answer in which it denied the allegations of the complaint and also raised several affirmative defenses similar to those set forth in Amsted's motion (R. 3).

Following a hearing and argument, the District Court on October 22, 1980 entered an order granting summary judgment to Respondents and dismissing Petitioners' complaint without prejudice (A. 21-32). The District Court ruled that the Union had fully performed its duty of fair representation owed to Petitioners in having bargained repeatedly with Amsted over the pension and insurance rights of the employees, and having sued to seek three-party arbitration amongst the Union, Amsted and the purchaser of Amsted's plant, SBL, which was still a party defendant in that ongoing litigation.

D. Proceedings Before The Appellate Court

On November 12, 1980, Petitioners filed their notice of appeal of the District Court's entry of judgment in favor of Respondents. On that date, Petitioners also filed their "F.R. App.P. 10 Statement of Issue" as follows:

Statement of Issue on Appeal

> Did the Trial Judge commit error in ruling as a matter of law that the defendant United Steelworkers of America had not breached its duty of fair representation?

On November 25, 1980, Amsted filed a notice of cross-appeal pursuant to Rule 4(a)(3) of the Federal Rules of Appellate Procedure in order to raise the issue of whether the District Court's judgment should have been with prejudice rather than conditioned upon possible "reinstitution" of Petitioners' Section 301 claim at a later time.

On December 24, 1980, Petitioners filed their brief and again set forth the sole issue on appeal as follows (p. 1):

Statement of Issue Presented for Review

> Did the Trial Judge commit error in ruling as a matter of law that the Defendant-Appellee, United Steelworkers of America, had not breached its duty of fair representation?

There was no argument whatsoever concerning ERISA in this or any subsequent brief of Petitioners.

Amsted filed its brief on February 26, 1981 and the Union filed its brief on February 27, 1981. The issues and arguments in both briefs omitted any discussion of ERISA and were directed solely to the Section 301 or "fair representation" issue which Petitioners had by this time repeatedly set forth as the only matter on appeal.

On August 21, 1981, the Seventh Circuit issued its opinion affirming the District Court's entry of summary judgment

in favor of the Union and Amsted, and granting Amsted's cross-appeal for a judgment with prejudice (A. 1-13). In a footnote, the Circuit Court observed that the only issue presented and argued by Petitioners was the fair representation issue under Section 301, and Petitioners therefore had "waived any challenge to the district court's disposition of their ERISA claim" (A. 12, n. 13).

On September 1, 1981, Petitioners filed a petition for rehearing and suggestion for rehearing *en banc* which asserted that, in light of the above footnote in the Circuit Court's opinion which might be interpreted as having a *res judicata* effect on Petitioners' ERISA claims, they should be permitted to raise them on appeal.

On December 2, 1981, the Circuit Court denied the petition for rehearing. On its own motion, the Seventh Circuit deleted footnote 13 and maintained the *status quo* under the lower court opinion since there had been no appeal on the ERISA claim (A. 14, 16). The Circuit Court stated: "Because the ERISA issue was not adequately briefed or argued before this court, we express no opinion as to the merits of plaintiffs' ERISA claim" (A. 17).

REASONS FOR DENYING THE WRIT

A. Petitioners' ERISA Argument Is Not Properly Before The Court

Petitioners argue initially that the Seventh Circuit's decision is inconsistent with *Barrentine* v. *Arkansas Best Freight System, Inc.*, 450 U.S. 728 (1981), which held that an employee's suit for wages under the Fair Labor Standards Act is not barred by the prior resolution of a grievance under the arbitration procedures of an applicable collective bargaining agreement because the suit is based upon an "individual" statutory right which is independent of the collective bargaining agreement. Petitioners argue that the

Seventh Circuit erred in "deciding" that Petitioners were required to exhaust their collective bargaining agreement remedies before litigating their ERISA claims, and that this "decision" is in conflict with *Barrentine*.

Apart from the total lack of merit in Petitioners' argument,* Respondent Amsted submits that it is not properly before this Court. As explained above, Petitioners based their action in the District Court on two separate grounds: LMRA Section 301 (the "unfair representation" claim) and ERISA. The District Court dismissed both claims without prejudice. Yet Petitioners chose for whatever reason not to appeal the dismissal of their ERISA claim and instead limited their appeal to the Section 301 issue (as their "Statement of Issue" and briefs to the Seventh Circuit make clear—see *supra*, p. 6). It was not until oral argument before the Seventh Circuit that Petitioners argued that this

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* Although the Seventh Circuit correctly declined to address Petitioners' ERISA argument, it commented in its supplemental decision that "the district court's apparent assumption that plaintiffs must exhaust their contractual remedies before instituting suit under ERISA seems well supported in the case law." (A. 17-18). Given that most pension and benefit plans, including the one at issue here, are products of collective bargaining agreements, it is not surprising that the lower courts have held that exhaustion of the agreements' arbitration procedures in pursuing collectively bargained pension rights was intended by Congress in passing ERISA. *Amato* v. *Bernard*, 618 F.2d 559 (9th Cir. 1980); *Challenger* v. *Ironworkers Local Union No. 1*, 619 F.2d 645 (7th Cir. 1980); *Haeberle* v. *Board of Trustees*, 624 F.2d 1132 (2d Cir. 1980); *Carpenters Local Union No. 1846* v. *Pratt-Farnsworth, Inc.*, 511 F.Supp. 509 (E.D. La. 1981); *International Molders and Allied Workers Union* v. *Aquarius Shoe Corp.*, 511 F.Supp. 361 (E.D. Mo. 1981). See also *Adams* v. *Anheuser-Busch, Inc.* Nos. 81-1345 and 81-1348 (3d Cir., January 11, 1982), in which *Barrentine* is discussed and distinguished as concerns grievances involving pension claims.

Court's then-recent decision in *Barrentine* had changed ERISA law.

The Seventh Circuit twice determined that it had no ERISA question before it. In its initial decision, the Circuit Court stated (A. 12, n. 13):

> The only issue presented and argued in plaintiffs' brief was whether the district court erred in ruling as a matter of law that the Union [had not] breached its duty of fair representation. Plaintiffs therefore waived any challenge to the district court's disposition of their ERISA claim. (citation omitted)

On denial of Petitioners' petition for rehearing, the Seventh Circuit modified its earlier decision to clarify that Amsted's cross-appeal seeking dismissal of Petitioners' action with prejudice affected only the Section 301 claim and not the ERISA claim presented in the lower court. The Seventh Circuit again stated: "Because the ERISA issue was not adequately briefed or argued before this court, we express no opinion as to the merits of plaintiffs' ERISA claims" (A. 17). The Seventh Circuit thus left intact the District Court's treatment of Petitioners' ERISA claim, and its comment that the District Court's apparent rationale "seems well supported in the case law" (A. 17-18) is dicta and not a part of the court's holding.

This Court often has held that it will not consider issues not properly raised and ruled upon before the lower court. *Delta Airlines, Inc.* v. *August,* 450 U.S. 346 (1981); *Adickes* v. *S.H. Kress & Co.,* 398 U.S. 144, 147 n. 2 (1970); *Lawn* v. *United States,* 355 U.S. 339, 362-63 n. 16 (1958); *California* v. *Taylor,* 353 U.S. 553, 557 n. 2 (1957). This rule is not inflexible, but as the Court has stated: "It is only in exceptional cases . . . that questions not pressed or passed upon below are reviewed." *Duignan* v. *United States,* 274 U.S. 195, 200 (1927); *Youakim* v. *Miller,* 425 U.S. 231, 234 (1976).

See generally, R. Stern and E. Gressman, *Supreme Court Practice*, § 6.27 (5th Ed. 1978). Indeed, the Court has departed from this rule only to resolve fundamental issues such as conflicting state and federal jurisdiction, *Youakim* v. *Miller, supra,* or to avoid the resolution of constitutional issues, *Boynton* v. *Virginia,* 364 U.S. 454 (1960).

Respondent Amsted submits that no such "exceptional" circumstances exist to require the Court to address Petitioners' ERISA argument. As twice determined by the Seventh Circuit, Petitioners elected to pursue only their Section 301 claim before that lower court. Wholly aside from the lack of merit in Petitioners' argument (see *supra*, p. 8n), they should not be permitted to violate the rules of procedure before this Court as well as the Seventh Circuit to the prejudice of Amsted.

B. The Seventh Circuit's Decision Affirming The District Court's Dismissal Of Petitioners' Unfair Representation Claim Is Consistent With Established Case Law

First, Petitioners' statement of the issue and subsequent argument are based upon blatant mischaracterizations of the record before the lower courts. Most importantly, Petitioners contend that the Union and Amsted had been "ordered" by a district court to arbitrate their grievance (Petition, pp. i, iii, 14, 18). As stated above (p. 4) and as is readily apparent to anyone who reads the district court order (Supp. App. A), Amsted was awarded a summary judgment in the Union's suit to compel trilateral arbitration, and no relief of any kind was or could have been ordered against it. The District Court's comment that the Union would have "leave to reinstitute proceedings against [Amsted] in the event that [it] fails to arbitrate bilaterally" (Supp. App. A) merely clarifies the scope of the judgment

because there was no issue as to bilateral arbitration before the court.*

Second, the legal principles governing actions for alleged breach of the duty of fair representation are well established. In accommodating individual interests of employees with the rights of a union as the exclusive representative of all employees in the bargaining unit, this Court has held that an employee may seek judicial enforcement of his alleged interests under the collective agreement "only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith." *Vaca* v. *Sipes*, 386 U.S. 171, 190 (1967); *Hines* v. *Anchor Motor Freight*, 424 U.S. 554 (1976). As the Court also stated in *Vaca*, 386 U.S. at 191:

> Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration . . .

Accord: Baldini v. *Local Union No. 1095, UAW*, 581 F.2d 145 (7th Cir. 1978); *Melendy* v. *United States Postal Service*, 589 F.2d 256 (7th Cir. 1978).

Determining whether a union has acted towards an employee in an arbitrary, discriminatory or bad faith manner necessarily depends upon the facts of the particular case. The Seventh Circuit carefully analyzed the record, cited more than 10 Supreme Court and several circuit court decisions, and discussed thoroughly the principles which apply to such cases (A. 5-12). The Circuit Court then correctly

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* Contrary to the confusing and potentially misleading statement of facts in the petition, p. 8, Amsted never refused to proceed to bilateral arbitration except after and while the instant litigation was before the lower courts.

concluded that Petitioners' attempt to secondguess the Union's strategy in pursuing their claims could not be permitted (A. 12):

> There is no suggestion in this case of particularized discrimination against or hostility toward the plaintiff employees. Moreover, the decision challenged in this case obviously implicates substantial interests of the Union in its capacity as representative of the entire bargaining unit. Even if the Union's litigation strategy were subsequently determined to be misconceived, it would be excessively intrusive into Union decision-making for the courts to decide, in the absence of bad faith or egregious conduct, whether the Union has pursued the tactics most appropriate to the aggrieved employees' needs. See *Hines,* 424 U.S. at 554, 96 S.Ct. at 1048 (breach of duty involves "more than demonstrating mere errors in judgment"); *Baldini* v. *United Automobile Workers,* 581 F.2d 145, 151 (7th Cir. 1978); *Ruzicka,* 523 F.2d at 316 (McCree, J., concurring).

In short, Respondent Amsted submits that the Seventh Circuit correctly held under applicable precedent that the Union had not breached its duty of fair representation and that the District Court correctly had entered summary judgment in favor of Respondents.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STEELWORKERS OF AMERICA, *Plaintiff,* v. SOUTH BEND LATHE, INC., et al, *Defendants.*	No. H 76-115

ORDER

This cause came to be heard on defendant, Amsted Industries, Incorporated's, motion for summary judgment.

Messr. William H. Schmelling appeared in behalf of the plaintiff; Messrs. William W. McKittrick and Lawrence L. Summers, of Vedder, Price, Kaufman & Kammholz and Palmer C. Singleton, Jr., of Singelton, Levy and Crist, appeared in behalf of defendant Amsted Industries, Incorporated; Messr. Franklin A. Morse II, of Thornburg, McGill, Deahl, Harman, Carey & Murray, appeared in behalf of defendant South Bend Lathe, Inc.

The Court having considered the pleadings, affidavits and exhibits of record, and the parties having filed memoranda of points and authorities in support of and in opposition to said motions, and after hearing oral argument by counsel for the respective parties in open court, and the Court being duly advised,

The Court finds that the defendant, Amsted Industries, Incorporated, is entitled to a summary judgment as a matter of law.

IT IS THEREFORE ORDERED that the motion for summary judgment of defendant, Amsted Industries, Incorporated, be and hereby is granted, provided, however, that plaintiff is hereby granted leave to reinstitute proceedings against defendant Amsted Industries, Incorporated, in the event that said defendant fails to arbitrate bilaterally with plaintiff.

Enter: October 1, 1976.

PHIL M. MCNAGNY, JR.
Judge, United States District Court

Petitioner's Reply Brief

Supreme Court, U.S.
FILED
APR 14 1987
ALEXANDER L. STEVAS

NO. 81-1624

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

D. E. BAKER, CLIFF TAYLOR, CARNEY LONG, AND TED JAMES, INDIVIDUALLY, AND ON BEHALF OF OTHER EMPLOYEES OF SOUTH BEND LATHE,

PETITIONERS,

VS.

AMSTED INDUSTRIES, INCORPORATED, A CORPORATION, AND UNITED STEELWORKERS OF AMERICA,

RESPONDENTS.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY TO RESPONDENT AMSTED INDUSTRIES INCORPORATED'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

		Page
I	Both Questions Presented For Review By This Court Were Raised Before, Considered And Decided By The Lower Court.....	2
II	Conclusion.....	7

TABLE OF CASES

	Page
Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 1603, (1970).....	6
Barrentine v. Arkansas-Best Freight System, _____ U.S. _____, 101 S.Ct. 1347 (1981)....	5
United Brotherhood of Carpenters, etc. v. United States, 330 U.S. 395, 67 S.Ct. 775, 784 (1947)...	7

NO. 81-1624

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

D. E. BAKER, CLIFF TAYLOR, CARNEY LONG, AND TED JAMES, INDIVIDUALLY, AND ON BEHALF OF OTHER EMPLOYEES OF SOUTH BEND LATHE,	)
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VS.	)
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RESPONDENTS.	)

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY TO RESPONDENT AMSTED INDUSTRIES INCORPORATED'S BRIEF IN OPPOSITION

I

BOTH QUESTIONS PRESENTED FOR REVIEW BY THIS COURT WERE RAISED BEFORE, CONSIDERED AND DECIDED BY THE LOWER COURT

In its opposition brief, Respondent Amsted Industries Incorporated (hereinafter Amsted) claims that "Petitioners' ERISA argument" is not properly before this Court because the issue was "not properly raised and ruled upon before the lower court." (Amsted's Brief in Opposition, p. 9). Amsted is wrong.

The "ERISA issue," as Amsted calls it, is whether the Petitioners must await the outcome of a related lawsuit being pursued by the Union against another corporate defendant which could also be liable to Petitioners for pension and insurance benefits, before Petitioners are entitled to a declaratory judgment of their pension and insurance rights as to Amsted.

Both the District Court and the Seventh Circuit Court of Appeals decided that issue adversely to Petitioners. The Court of Appeals held in its order modifying its original opinion: "As to plaintiffs' ERISA claim, however, we affirm the district court's dismissal without prejudice to the extent that plaintiffs may reinstitute proceedings against Amsted after the termination of the Hammond litigation. . . ." (A. p. 16).[1]

"Accordingly, those portions of the district court's opinion granting defendants' motions for summary judgment against the Union and dismissing plaintiffs' ERISA claim without prejudice are

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1 The reference is to the Appendix to the Petition for Writ of Certiorari.

affirmed. . . ." (Emphasis added) (A. p. 18).

Thus, it is clear that the Seventh Circuit Court of Appeals held that Petitioners must await the outcome of the Union's attempt to compel the other corporate defendant to arbitrate the pension and insurance dispute before they can proceed to a judicial determination of their pension and insurance claims against Amsted.

Furthermore, Amsted's statement that Petitioners made "no argument whatsoever concerning ERISA" (Amsted's Brief in Opposition, p. 6) in any of their briefs before the Seventh Circuit is a flagrant misstatement of the record. Petitioners repeatedly made reference to their reliance on ERISA's declaratory judgment section as one of the bases for their suit.

Plaintiffs-Appellants' Brief, pp. 2, 5, 6, 14; Plaintiffs-Appellants' Reply and Cross-Appellees' Brief, pp. 10, 11, 12, 14, 25.

Amsted, itself, made reference to Petitioners' reliance on ERISA.

Reply Brief of Defendant-Appellee and Cross-Appellant Amsted Industries, Inc., pp. 3-5.

Before oral argument, the Seventh Circuit and opposing counsel were notified by letter that Petitioners were relying on this Court's holding in Barrentine v. Arkansas-Best Freight System, _____ U.S. _____, 101 S.Ct. 1437 (1981), in support of their argument that ERISA allowed them to proceed against Amsted irrespective of the labor agreement.

This precise issue was orally argued quite extensively before the

Seventh Circuit by counsel for Petitioners and counsel for Amsted.

Further written arguments concerning their right to an immediate judicial hearing irrespective of the labor agrement were made to the Seventh Circuit by both Petitioners and Amsted.

> Plaintiffs-Appellants' Petition for Rehearing and Suggestion for Rehearing In Banc, pp. 3-9;
> Answer of Amsted Industries Incorporated to Plaintiffs-Appellants' Petition for Rehearing and Suggestion for Rehearing In Banc, pp. 5-10;
> Plaintiffs-Appellants/Cross-Appellees' Reply to Amsted Industries Incorporated's Answer to Plaintiffs-Appellants' Petition for Rehearing and Suggestion for Rehearing In Banc, pp. 2-25.

The so-called ERISA issue was raised, considered and decided by the lower court, and that issue is, therefore, subject to consideration by this

Court.

> Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 1603, n. 2 (1970).

The ERISA issue here is the type of fundamental issue that this Court could determine even if it had never been considered by the lower court.

> United Brotherhood of Carpenters, etc. v. United States, 330 U.S. 395, 67 S.Ct. 775, 784 (1947).

II

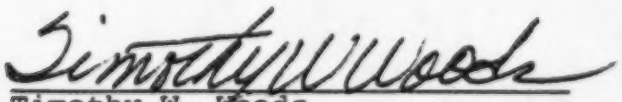
CONCLUSION

Petitioners have waited since October 1, 1976, for their Union to arbitrate their pension and insurance claims with Amsted but the Union has failed without explanation to arbitrate the dispute. Petitioners should not have to wait any longer. ERISA entitles them to a judicial determination of

their rights -- an entitlement to which they have thus far been denied and which is long overdue.

For all of the foregoing reasons, this Court should grant the petition for certiorari and enter an appropriate order as to both questions presented for review.

Respectfully submitted,



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